INITIAL STATEMENT OF REASONS
for
PROPOSALS TO AMEND REGULATIONS IN SUBCHAPTER 4, ADOPT A NEW SUBCHAPTER 4.5, AND MAKE RELATED REVISIONS TO CHAPTER 8, TITLE 8, CALIFORNIA CODE OF REGULATIONS (COMMENCING WITH SECTION 16421).

The Director of the Department of Industrial Relations ("Director") proposes to amend regulations governing the approval and operation of Labor Compliance Programs by state and local agencies involved with public works construction contracts. These regulations are found in Subchapter 4 of Chapter 8, commencing with section 16421, of Title 8 of the California Code of Regulations. The Director also proposes to adopt new regulations governing fees and monitoring and enforcement standards for the Labor Commissioner on state bond-funded and other specified public works projects, as required under the provisions of Stats. 2009, ch. 7 [SBX2-9]. The Director proposes to adopt these regulations as a new Subchapter 4.5 of Chapter 8, Division 1 (sections 16450 – 16464), of Title 8 of the California Code of Regulations. In connection with these substantive proposals, the Director is also proposing to redesignate Articles 6 (Severability) and 8 (Debarment) of Subchapter 4 as Subchapters 4.6 and 4.8 respectively and make an additional technical revision to section 15000 (Severability).

GENERAL INFORMATION

The laws regulating public works projects require among other things that contractors and subcontractors pay their workers not less than the general prevailing wage rates as determined under the Labor Code. State prevailing wage requirements customarily are enforced by the State Labor Commissioner (also known as the Chief of the Division of Labor Standards Enforcement) through the investigation of complaints and the issuance of civil wage and penalty assessments to compel the payment of sums found due. The Director also approves labor compliance programs ("LCPs") to enforce state prevailing wage requirements on behalf of state and local agencies, including school districts, that award public works contracts. In addition to enforcement, LCPs have education and monitoring responsibilities and are subject to oversight by the Labor Commissioner and the Director.

LCPs were first authorized through the adoption in 1989 of Labor Code section 1771.5,[1] which raised prevailing wage exemption levels for awarding agencies that assumed specified monitoring and enforcement responsibilities on all of their public works projects. Prior to 2002, fewer than a dozen agencies sought and obtained approval as LCPs under this original authorization; these LCPs are sometimes referred to as "legacy programs." Subsequent legislation began to require awarding agencies either to have or to contract with an approved LCP for monitoring and enforcement on projects using specified bond funds or other statutory authorizations.[2]

[1] Stats. 1989, ch. 1224, §2.

[2] A list of these laws is available at http://www.dir.ca.gov/lcp/StatutesRequiringLCPs.pdf.

The statutes which required the use of LCPs, especially Labor Code section 1771.7, which required LCPs for public works projects funded by the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004, led to a sharp increase in the number of approved LCPs and to two sets of revisions to the regulations that govern LCPs. In 2004, the LCP regulations (at Title 8, California Code of Regulations, §§16421 – 16439) were amended to address the new statutory LCP requirements along with other changes in the laws governing prevailing wage enforcement and to provide some specific rules for third party contract LCPs. In 2008, these regulations were further amended to clarify and set forth in greater detail the monitoring, enforcement, and reporting responsibilities of LCPs.

The mandated use of LCPs on bond-funded projects came to be viewed as a flawed enforcement model. Using cost figures provided by the State Allocation Board and LCP annual report statistics, the Legislative Analyst's Office determined in a 2007 report that LCPs were spending from $18 to $23 for every dollar in wages or penalties recovered. Citing this report, the Governor vetoed SB 18 (Perata, 2007), which would have required the use of LCPs for projects funded by the Kindergarten-University Public Education Facilities Bond Acts of 2006. In his veto message for SB 18, and in a similar veto message the following year for SB 191 (Padilla), the Governor asked the Labor and Workforce Development Agency and the Department of Industrial Relations ("Department') to look for alternatives to ensure the proper enforcement of prevailing wage laws.

On February 20, 2009, the Governor signed into law Senate Bill 9 (Padilla), *i.e.* SBX2-9, one of several measures adopted in the legislature's second extraordinary session to address California's budget crisis. SBX2-9 amended all but one of the laws that currently require awarding agencies to have or to contract with an approved LCP as a condition for using specified bond funding or other particular statutory authorizations.[3] In lieu of monitoring and enforcement by an LCP, the statutes instead will require awarding agencies to pay a capped fee to the Department for compliance monitoring and enforcement on projects that are subject to the fee. SBX2-9 also expanded the range of projects that are subject to or eligible for this fee-based compliance monitoring and enforcement in two respects: (1) it will be required for projects funded by *any* state-issued public works construction bond (rather than just specified bonds); and (2) it will be available to awarding agencies that meet certain conditions and agree to pay the fee for enhanced monitoring and enforcement on all of their projects in order to have higher prevailing wage exemption levels.

SBX2-9 requires the Department to determine the amount of the fee that will be assessed for its compliance monitoring and enforcement, subject to the approval of the Department of Finance and specified statutory caps. It provides that the Department may waive this fee for awarding agencies with previously approved LCPs that want to continue using that LCP for their own projects; but does not permit waivers for awarding agencies that contract out their LCP responsibilities to a third party. SBX2-9 also requires the Department to adopt reasonable regula-

[3] The exception is Public Resources Code §75075, which requires use of an LCP for projects financed in any part by the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 (Proposition 84). Because this measure was adopted by voter initiative, it can only be amended by another ballot measure.

tions setting forth the manner in which it will ensure compliance and enforce prevailing wage requirements on projects subject to the fee, taking into consideration the duties of LCPs under 8 Cal.Code Reg. §§16421 – 16439. SBX2-9 further provides that the fee for compliance monitoring and enforcement by the Department will apply only to public works contracts awarded after both the fee and the regulatory monitoring standards have been adopted; for contracts awarded prior to that date, any pre-existing LCP requirements will continue to apply.

The primary purpose of this rulemaking is to adopt the regulations needed to implement the requirements of SBX2-9. A secondary purpose is to make further revisions to the existing LCP regulations to bring them into conformity with the requirements of SBX2-9 and make other isolated improvements suggested through the Department's recent experience in regulating LCPs. The proposals can be divided into four parts: (1) revisions to the LCP regulations in Subchapter 4 of Chapter 8, Title 8 of the California Code of Regulations; (2) a new set of regulations governing notices, fees, and fee waivers under SBX2-9, which will constitute Article 1 of a new Subchapter 4.5 of Chapter 8, Title 8 of the California Code of Regulations addition; (3) another new set of regulations setting forth the Department's compliance monitoring standards, which will constitute Article 2 of the new Subchapter 4.5; and (4) conforming technical revisions to the headings and text of subsequent regulations.

PROPOSED AMENDMENTS AND NEW REGULATIONS

The Director proposes to amend several sections within Subchapter 4 of Chapter 8, Title 8 of the California Code of Regulations (Awarding Body Labor Compliance Programs). The Director also proposes to add a new Subchapter 4.5 (Compliance Monitoring by Department of Industrial Relations), which will be divided into Article 1 (Notices, Fees, and Waivers), containing sections 16450 through 16455 inclusive, and Article 2 (Compliance Monitoring Standards), consisting of sections 16460 through 16464 inclusive. In addition, the Director proposes to redesignate current Articles 6 (Severability) and 8 (Debarment) of Subchapter 4 as Subchapters 4.6 and 4.8 respectively and make an additional technical revision to section 15000 (Severability). The following statements apply to all of the proposed amendments and proposed new regulations unless otherwise indicated.

- The Director relied in part on the following items to help inform his thinking on these proposals: (1) cost and budget information provided by the State Allocation Board, City of Los Angeles Labor Compliance Program, Los Angeles Unified School District Labor Compliance Program, and California Department of Transportation ("Caltrans") Labor Compliance Program; (2) Legislative Analyst's Office Analysis of the 2007-08 Budget Bill, Capital Outlay Chapter (February 21, 2007); (3) estimated program costs based on projections for projects subject to the fee; and (4) workload data for the Department's current prevailing wage enforcement program.

- In accordance with Government Code section 11346.45, which directs state agencies to involve affected parties in public discussions regarding proposed regula-

tions, the Director circulated draft proposals among representatives of construction trades contractors and labor organizations, labor compliance monitors, labor compliance programs, county, city, and special district associations, school districts, trainers, and other governmental agencies with a particular interest in labor compliance monitoring and enforcement. Department representatives held group meetings with some of these representatives in Los Angeles and Sacramento and also received input from individual representatives, both orally and in writing.

- The Department consulted legal authorities (case law, statutes, and regulations) to ensure that these proposals meet applicable legal standards.

- These proposals involve the creation and operation of a new monitoring and enforcement unit within the Department's Division of Labor Standards Enforcement ("DLSE") and the adoption of fee, notice, and record submission requirements to effectuate the provisions of SBX2-9. The Director's proposals are structured around (1) a flat fee system, with an option to negotiate for direct notices and fee payments by bond-funding agencies; (2) awarding agency project notice requirements that will dovetail with the project notices that are already required under existing law (Labor Code section 1773.3); and (3) electronic payroll record submission by contractors to the new monitoring unit. Reasonable and more conventional alternatives would employ more precise project-by-project billing and accounting with post-project auditing; multiple notices as needed to cover fee calculations, billings, and project monitoring information; and submission of payroll records on paper forms. However, the Director believes these proposals are less expensive and less cumbersome administratively for the Department, awarding agencies, and contractors alike. The Director also believes that enforcement and construction dollars should not be diverted to support more expensive and elaborate billing and collection systems.

- The proposals are being designed so that awarding agencies and contractors may provide notices and reports through web-based reporting systems. These systems will use technologies that are already in common use by awarding agencies and construction contractors and will not require the purchase of additional hardware or software nor specialized training.

- These proposals directly impact only those state and local agencies and contractors that choose to engage in public works construction projects that are subject to the fee and monitoring requirements prescribed by SBX2-9. The proposals make no changes in the legal obligations of contractors on public works construction projects. For awarding agencies, they create the obligations minimally necessary to implement the requirements of SBX2-9.

- The Director believes that these proposals impose no mandates or costs that are different or distinct from what the Legislature has required by statute. The Director believes that the proposals may create savings by dovetailing notice requirements with another statutorily required notice, by limiting the exchange of notices

and correspondence between awarding agencies and the Department, and through the use of technologies that will automate the collection of necessary data and eliminate the cost of preparing, submitting, and storing paper records.

- The general purpose of the proposed amendments to the LCP regulations (sections 16421 – 16439) is to make revisions needed to conform to changes in how LCPs will be regulated and continue to operate under SBX2-9, and make other isolated regulatory improvements in light of recent experience and the reduction in the number of approved LCPs.

- The proposals include an option to contract with the new DLSE monitoring and enforcement unit as a means through which an awarding agency may comply with an existing LCP requirement for projects awarded before the new SBX2-9 system goes into effect. While the Director is proposing regulatory language to provide this option, additional data is still needed to determine whether the new monitoring unit would in fact have the resources and capacity to handle this additional contract work.

- Proposed Article 2 of new Subchapter 4.5 (sections 16460 – 16464) and certain related provisions in section Article (sections 16450 - 16455) are intended to serve as "reasonable regulations setting forth the manner in which the Department will ensure compliance and enforce prevailing wage requirements" under SBX2-9, in accordance with Labor Code Section 1771.55(b)(2)'s specific directive to adopt such regulations.

Amendments to LCP Regulations (Subchapter 4 of Chapter 8, Title 8, Calif. Code Regs.)

Title: The reason, purpose, and necessity for revising the title of this subchapter to read simply "Labor Compliance Programs" is for the sake of simplicity and clarity. The inclusion of the words "Awarding Body" in the current title is somewhat misleading in that not all LCPs are attached to an awarding body, and the Department uses the term "awarding body program" in other contexts to refer to a subset of programs that does not include third party programs, including in the headings of sections 16425 and 16426 and in reference to the different Annual Report forms designated for use under section 16431.

Amendments to section 16421: The purpose of the proposed amendment to *section 16421* is to delete subpart (c) in order to delete the only specific reference in the LCP regulations to the approval of *private* entities as LCPs. The reasons for deleting this subpart are based on the lack of any statutory or regulatory imperative to separately approve private entities to perform this function and the desire to eliminate issues that have arisen in connection with the separate approval of private entities. In particular, Labor Code Section 1771.5 authorizes the establishment of LCPs with specified prevailing wage monitoring and enforcement responsibilities to be performed by or on behalf of awarding agencies. Other statutes that require the use of LCPs on specified projects, such as Labor Code Section 1771.7, also express this requirement as an obligation of awarding agencies that may either be performed in house or contracted for through a third

party. The state's interest in approving LCPs is to ensure that the monitoring and enforcement responsibilities of awarding agencies under Labor Code Section 1771.5 and related regulations are carried out properly. This interest is the same regardless of whether the awarding agency uses in house staff or contracts with a separate entity to perform these functions. Under existing law, the state has no distinct regulatory interest in approving private entities to carry out these responsibilities, since the responsibilities ultimately belong to awarding agencies as governmental agencies performing governmental tasks, and private entities cannot exercise such governmental authority independently.

When the authority to "contract out" for LCP services was first recognized through the adoption of Labor Code Section 1771.7 in late 2002, the former Acting Director began to approve private third party programs as an accommodation to school districts that needed to have an approved program in place in order to gain access to state school construction bond funding. At the time there was confusion over whether the Director needed to approve an awarding agency's program, the third party entity, or both. These issues eventually were clarified through later amendments to the LCP regulations. However, issues and concerns have continued to persist over (1) the governmental responsibilities of private entities when carrying out an awarding agency's responsibilities under Section 1771.5 [the specific issue addressed by subpart (c) of regulatory *section 16421*], (2) conflicts of interest for private programs affiliated with construction managers, contractors, or labor monitoring groups, and (3) economic factors that operate as disincentives to proper enforcement or lead to unfounded claims of having a vested right in the Director's approval. For the reasons noted above, there is no legal imperative to approve private entities as LCPs separate and apart from the awarding agencies who are required to provide these services; and with the numbers of approved LCPs now greatly diminished and the need for such programs further diminishing under SBX2-9, there is no practical need or benefit in continuing to separately approve private entities as LCPs.

The necessity for deleting subpart (c) is to eliminate the implied authority to approve and any implied claim of right by private entities to be approved as LCPs. The deletion will not change the right of awarding agencies to contract with third parties, including private third parties, to meet statutory LCP requirements. However, the Director's regulatory authority will focus on the responsibility of awarding agencies, consistent with the underlying statutes. The deletion also will not eliminate the responsibility of anyone exercising an awarding agency's governmental authority (whether that person is an in house employee or a contract consultant) to comply with the legal responsibilities of governmental agencies and their agents, including but not limited to responsibilities under the Political Reform Act, Public Records Act, and Information Practices Act. Although subpart (c) previously was added as a point of clarification and emphasis for private contract programs, the specified responsibilities have always existed independently of this regulatory language.

Amendments to section 16423: The purpose of the proposed amendments to *section 16423* are (1) to provide awarding agencies that are subject to an existing LCP requirement the option of meeting that requirement through a contract with the DLSE's new compliance and monitoring unit, and (2) to require an awarding agency to notify the Director if it intends to use its LCP only for projects that otherwise would be subject to the fee and monitoring requirements

of the new Subchapter 4.5. The specifics of the option for contracting with DLSE to meet an existing LCP requirement are addressed in new regulatory section 16453. The reason for adding this option is to address the need of awarding agencies that remain subject to an existing LCP requirement (for projects awarded prior to the effective date of the new SBX2-9 system and for projects funded by Proposition 84), but lack the capacity or ability either to establish or maintain their own in house program or to contract with an approved third party program as the number of such programs diminishes. This option is designed in particular for awarding agencies that need a new LCP to close out a project after their existing LCP has lost its approval status or gone out of business. The necessity for this amendment is to specify and clarify that contracting with DLSE is an appropriate means for fulfilling the statutory option to contract with a third party for LCP services.

The reason and necessity for the new notification language is to identify awarding agencies that will be using their own LCPs to monitor and enforce compliance only on those projects that otherwise would be subject to fee-based monitoring by DLSE. These notifications will enable the Director to identify awarding bodies that are entitled to fee waivers under new section 16455(b) and also provide notice of the fact that the awarding agency will not use its LCP for projects that would not otherwise be subject to fee-based monitoring.[4] These awarding agencies will still be require to provide individual project notices under new section 16452, which will enable the Department and public to ascertain who has enforcement jurisdiction over a particular project in the event of any complaints about how monitoring is being conducted or that allege prevailing wage violations on that project.

Amendments to section 16427: The purposes of the proposed amendments to *section 16427* are to include a history of handling formal enforcement cases as a necessary requirement for obtaining extended authority and to authorize the Director to withdraw extended authority for good cause, including the failure to pursue formal enforcement cases in the preceding three years. The reason for the amendments is to set forth a regulatory criterion based on the principal benefit of "extended authority," which is the right to have forfeiture requests approved automatically unless *dis*approved by DLSE within 20 days. Since this authority presumes a level of confidence in the LCP's requests to pursue formal enforcement, it is reasonable to require a prior enforcement history as a criterion for obtaining this authority, and it is unreasonable to extend this benefit in the absence of such a history. The reason for the addition of new subpart (f) is to clarify that the Director may withdraw extended approval, including for the specified reason of having no formal enforcement history in the preceding three years, without otherwise changing the LCP's approved status. The three year period specified in subpart (f) is coextensive with the minimum of three consecutive years of operation required to obtain extended approval under subsection (a) and regarded as a fair time frame within which to acquire an overall picture of the quality of program operations. The necessity for these amendments is to establish regulatory criteria that may be applied consistently and uniformly to all LCPs that seek or have obtained extended authority.

[4] Such projects would come under the general enforcement authority of DLSE and awarding agencies under Labor Code Sections 1726 and 1727, without the active monitoring component required of LCPs under Labor Code Section 1771.5 and of DLSE under SBX2-9.

Amendments to section 16428: The purpose of the proposed amendments to subpart (a)(1) of this section is to set forth a minimum threshold standard for revocation of approval based on the grounds of failing to monitor compliance or take appropriate enforcement action on violations of which the LCP was or should have been aware. The three elements in this standard are based on factors that have been considered in evaluating individual revocation complaints and are designed to curtail complaints that request revocation of approval based on an isolated error in judgment or a good faith dispute over the proper application of prevailing wage requirements. Revocation proceedings can require a substantial investment of time and resources, and the sanction of revocation is intended to address situations in which the LCP should no longer be entrusted with enforcement responsibilities due to serious misfeasance or a demonstrable lack of competence. Revocation complaints are not a proper vehicle for resolving good faith disputes over the interpretation of prevailing wage requirements; and complainants, including joint labor-management monitoring groups, have other remedies to pursue claims based on an interpretation of prevailing wage law that may differ from the LCP's interpretation or DLSE's enforcement policy (which LCPs are required to follow per section 16434(a)). The necessity for these amendments is to establish regulatory criteria that may be applied consistently and uniformly to all revocation complaints.

The purpose of the proposed amendment to subpart (b) is to require complainants to provide a copy of their complaint and supporting evidence to the subject LCP, so the LCP will have an opportunity to respond promptly. The reasons or having such a requirement is as a matter of fundamental fairness to the respondent whose status is under challenge and to save the Department the administrative cost and attendant delay in having to copy and forward the complaint and evidence to the LCP for response. It also places the complainant on notice that the complaint will not be considered or acted upon without hearing from the other side. The necessity for this amendment is to establish a regulatory criterion that may be applied uniformly and consistently to all revocation complaints.

Amendments to section 16431: The purpose of the proposed amendment to subpart (a) of this section is to return to the uniform fiscal year reporting for all LCPs, as existed prior to the 2004 amendments to this section, subject to an opportunity to request a different reporting period for good cause. The reason for creating non-uniform reporting periods (based on initial date of approval) in the 2004 amendments was to spread out the filing of reports by several hundred new LCPs so the Director's Office would not be inundated with the task of receiving and having to review all reports at one time. However, those concerns did not materialize in practice due to initial widespread noncompliance with reporting obligations and the fact that the Director's office did not routinely review the reports upon receipt. On the other hand, the Director's office did start using the reports to compile statistics on annual enforcement activity by all LCPs, and for this purpose a uniform reporting period is preferable. A substantial reduction in the number of approved LCPs (due in substantial part to failure to comply with reporting requirements) has also lessened the impact of receiving a large number of reports at any one time. The reasons for returning to the uniform July to June fiscal year reporting period are to provide for more uniform and accurate statistical compilation and analysis, to make the reporting period easier to determine (both by filers and persons who review the reports), and to base LCP annual reports on the same

fiscal year used by legacy programs and in predominant use for most other purposes by state and local agencies and school districts.

The purpose of the language being added to the last subpart (e) is to require close-out reports from LCPs that cease operating. The reason for adding this requirement, which has been imposed on some individual programs in conjunction with withdrawals or revocation of approval, is to provide a means to track enforcement activity and compile statistical data for these close-out periods in order to have a more complete picture of that activity. The necessity for both amendments (to subparts (a) and (e)) is to establish regulatory reporting criteria that will apply uniformly and consistently to all LCPs, subject to an exception for individual LCPs that have good cause for having a different reporting period. The need to cover any lag period or overlap between current reporting periods and the proposed new fiscal year reporting, can be addressed through appropriate instructions (or overlapping reports) and does not appear to be a necessary subject for separate regulatory language.

Amendment to section 16433: The purpose of the proposed amendment to this section is to add a statutory citation to new Labor Code Section 1771.55(a), to which the limited exemptions addressed in this section will also apply. The reason and necessity for this amendment is to bring the regulation into conformity with a statutory revision made by SBX2-9.

New Regulations for Fee-based Compliance Monitoring by Department (New Subchapter 4.5 of Chapter 8, Title 8, Calif. Code Regs.)

Proposed Article 1.

New section 16450: The purpose of this proposed new section is to set forth the four distinct situations to which the new fee-based compliance monitoring and enforcement by the Department will apply. Three of these situations are prescribed by SBX2-9 and at times may overlap: (1) projects funded by state-issued bonds; (2) other projects made subject to the fee by statute (referring to design-build and other authorizing statutes containing this requirement); and (3) other projects undertaken by an awarding agency that opts to use the system for all projects in exchange for higher prevailing wage exemptions. The fourth situation is not part of SBX2-9 and does not overlap with the others, but is proposed here as an option for projects that remain subject to existing LCP requirements after the new system goes into effect.

The reason for this particular regulation is to collect the disparate situations that are addressed in several sections of SBX2-9 and provide a single discrete and clarifying reference guide for the situations to which the proposed regulatory sections would apply. The necessity for such a regulation is to provide clarity and avoid the need for the public to scrutinize the various amendments and enactments in SBX2-9 to determine which situations are covered by these regulations. The reason and necessity for subpart (c), which covers the option of contracting for fee-based monitoring by the Department to meet an existing LCP requirement, is to specify and clarify that it will come under the same regulatory standards that apply to projects under the new SBX2-9 system.

New section 16451: The purpose of this proposed new section is to set forth the obligations of awarding agencies to provide notices and certain information to the Department, to contractors, and to workers and other job site visitors on projects that are subject to fee-based compliance and monitoring by the Department. The purpose of subparts (a)(1) and (2) is to state when notice must be sent to the Department, and the purpose of subpart (a)(3) is to set forth the eight pieces of information that must be included in that notice. The reason for the timing of the notices in subparts (a)(1) and (a)(2) is to coincide with the receipt or issuance of notice that makes the project subject to fee-based monitoring and enforcement under SBX2-9. This makes notification to the Department by an awarding agency as simple as sending one additional notice (or possibly one additional copy of a notice) when issuing award or contract notifications, making it easier to remember and more convenient to perform; and will also provide the Department with notice as early as possible to allow for the prompt commencement of monitoring activities. The reason for the notice items in subpart (a)(3) is to provide the Department with information available from other funding or contract award documents that will enable the Department to communicate with the awarding agency and prime contractor, calculate the fee, and know when and where to conduct monitoring activities. With the exception of date of contract and funding source (which is needed for the fee calculation), the information items are already part of the Extract of Public Works Contract Award form (DAS 13) which awarding agencies are required to submit to the Department's Division of Apprenticeship Standards within five days of a contract award pursuant to Labor Code Section 1773.3. The necessity for subparts (a)(1) through (a)(3) is to provide the Department with the information needed to carry out its responsibilities under SBX2-9 to determine fees and promptly commence monitoring and enforcement.

The purpose of subpart (a)(4) is to make an exception to the foregoing requirements for *ongoing* projects in which the awarding agency is seeking to contract for fee-based monitoring by the Department to meet an LCP requirement that continues to apply to that project. The reason and necessity for this exception is that compliance with notice deadlines would be impossible after the fact, some of the notice information would be irrelevant, and any necessary information could be requested and obtained in course of negotiating a contract for services under section 16451.

The purpose of subpart (b) is to specify that the Director may provide a system for compliance with this section and with Labor Code Section 1773.3 though a single notice. The intent is to create a single web-based report form that will obtain and transmit the information needed for either purpose, with the transmitted information accessible in turn by units within the Department that need that information. The word "may" rather than "shall" is used because the Department is still trying to determine how to implement this option, and it also allows for the possibility that SBX2-9 and Labor Code Section 1773.3 reporting needs or requirements may change or diverge in the future. The reason and necessity for this subpart is to clarify that awarding agencies may comply with the two notice requirements through a single form notice, if the Director provides a single notice for that purpose.

The purpose of subpart (c) is to require language in bid notices and public works contracts to notify bidders and contractors that the project is subject to prevailing wage requirements and also to fee-based monitoring by the Department, including the obligation to furnish certified

payroll records directly to the Labor Commissioner. The reason for this subpart is to provide notice to make it clear that prevailing wages and specific monitoring requirements will apply to the project in question, helping to ensure compliance with those requirements and curtail legal disputes over whether they in fact apply. This subpart tracks notice requirements that currently apply to LCP-monitored projects under Labor Code Section 1771.5(b)(1) and 8 Calif. Code Reg. sections 16421(a)(1) and 16429, and is a means for informing bidders and contractors in order to improve compliance with prevailing wage laws. Awarding agencies may comply with this requirement by incorporating standardized language into bid and contract documents for projects that are subject to SBX2-9 requirements. Most public works contracts already include standardized language concerning the applicability of prevailing wage laws, so from a practical standpoint, this will require only an added notification that the project will be monitored by and certified payroll records furnished to DLSE rather than an LCP or other compliance monitor. The necessity for this subpart is to make the furnishing of this notice a regulatory criterion that applies to any project subject to SBX2-9 fee-based monitoring.

The purpose of subpart (d) is to require the posting of notices with prescribed language at project work sites in order to notify workers and other job site visitors that the project is subject to prevailing wage requirements, that it is being monitored by DLSE's compliance and monitoring unit, and that complaints concerning nonpayment of required rates can be made to the compliance and monitoring unit. The requirement is similar to other job site notice posting requirements that are designed to inform employees of workplace rights and where to present claims or complaints concerning those rights. (*See for example* Labor Code Section 3550, which sets forth notice posting requirements with respect to workers' compensation rights, claims, and benefits.) A similar notice posting requirement applied to LCPs under regulatory section 16429, although this proposal is more detailed since it contains the actual language that the Department intends to have posted to inform workers about its compliance and monitoring unit. The reason for this subpart is to provide workers with direct access to neutral information about their prevailing wage rights, including their right to complain to DLSE about a suspected violation. The posting of such notices also educates contractors and acts as a disincentive to violations. The necessity for this subpart is to make the posting of the prescribed notice a regulatory criterion that applies to any project subject to SBX2-9 fee-based monitoring.

New section 16452: The purpose of subpart (a) is to set forth the manner in which fees will be calculated. As with proposed section 16450 above, this proposal takes information from the various parts of SBX2-9 and collects it in one place. Subpart (a)(1) is the formula for projects that are subject to SBX2-9 requirements solely by reason of the receipt of state bond funding and is the maximum fee of one-quarter of one percent of bond proceeds authorized for such projects pursuant to Labor Code Sections 1771.3(a)(2), 1771.75(a), 1771.85(a), and 1771.9(a). Subpart (a)(2) is the formula for all other projects that are subject to SBX2-9 requirements pursuant to Education Code Sections 17250.30(d)(2) and 81704(d)(2), Government Code Section 6531(f)(2), Labor Code Section 1771.55(a)(3), and Public Contract Code Sections 20133(b)(3)(B), 20175.2(b)(5)(B), 20193(b)(2), 20209.7(c)(2), 20209.24(b), and 20919.3(a)(2), and is the maximum of one-quarter of one percent of project costs authorized by Labor Code Section 1771.55(a)(3), unless the project also receives state bond funding, in which case the formula that yields the higher fee will apply.

The reasons for prescribing the maximum fees authorized under SBX2-9 (subject to a possible limitation in the "total project costs" definition as discussed below) are: (1) for bond-funded construction, which is anticipated to constitute the majority of projects under the new system, the maximum fee of one-quarter of one percent of the bond proceeds will yield less than half the funding provided by the State Allocation Board for the cost of LCP monitoring and enforcement on state bond-funded school construction projects; (2) the bond proceeds from which this fee is calculated may represent only a fraction of total project costs, but the Department's monitoring and enforcement responsibilities will extend to the entire project; (3) the Department will have no other source of funds to perform the compliance monitoring and enforcement required by SBX2-9; (4) although design-build and other projects that are subject to the "total project costs" fee formula may generate higher fees, the ability to identify and collect fees for such projects will depend in the first instance on awarding agencies self-identifying and providing notice of those projects, which in light of the historically inconsistent performance of awarding agencies in providing the Department with information or notices required for public works enforcement, likely means greater administrative costs for tracking, collecting fees, and initiating monitoring on such projects; (5) ultimately, the projects must generate a level of funding to support the Department's compliance monitoring and enforcement on subject projects statewide, and a flat percentage fee that can be calculated once and paid up front (similar to how many insurance premiums are billed and paid) will generate a more predictable level of funding, without focusing unduly on the cost or "profitability" of monitoring and enforcement on any specific project; (6) the flat fee formulas will also substantially reduce administrative expenses for billings, payments, audits, and collections that would be incurred by awarding agencies and the Department under more detailed formulas; and (7) through greater efficiency, expertise, and DLSE's singular focus on labor standards enforcement, the Department is still expected to provide improved compliance monitoring and enforcement on these projects at substantially less cost than other enforcement models.

The purpose of subpart (a)(3) is to exclude land acquisition costs from the term "total project costs" as used to calculate fees for projects under subpart (a)(2). Although "total project costs" is not specifically defined by SBX2-9 or other statutes and logically may embrace any expense incurred for the project, whether or not actually related to construction, land acquisition often is completely unrelated to current construction and may have occurred years or decades earlier, making valuation difficult and the logic of incorporating this factor into project costs questionable. The reason for not excluding other "soft" costs, such as architect fees, is that the term "total project costs" plainly embraces other costs that are not strictly for construction (*see for example* the definition of "cost of a public building" in Government Code Section 15802, which does include real estate and a range of other costs, including financing costs), and the primary purpose of the fee and SBX2-9's fee calculation formulas is to generate a level of funding for monitoring and enforcement by the Department rather than to match fees precisely to specific individual project costs.

The purpose of subpart (a)(4) is to provide that the Department may charge a lower or pro rata fee when providing fee-based monitoring enforcement by contract for an ongoing project that is subject to an LCP requirement. The reason for this subpart is to clarify that the fee is ne-

gotiable in situations where the project is near completion and little activity is contemplated, but the awarding agency still needs monitoring and enforcement coverage for the balance of the project to meet the LCP requirement.

The purpose of subpart (b) is to specify that fees are payable at the same time that notice to the Department is required under proposed section 16451(a). The reason for requiring payment at that time is because the fee can be readily calculated and paid at the time that the bond funding or the public works contract that triggers the fee requirement is awarded. In the case of bond funding, the fee potentially could be paid directly to the Department by the funding agency, with the awarding agency receiving the net proceeds and having no further administrative responsibility to calculate or pay a fee. Even in situations where there is no bond money and the project may not yet be fully funded, the fee will not be substantial enough to warrant delayed or staggered payments.[5]

The necessity for subparts (a) and (b) is to establish the fee and time of payment as regulatory standards that will apply to any project that is subject to the fee.

The purpose of subpart (c) of this section is to restate the statutory requirement that fees be deposited into a specified dedicated fund and used only for prevailing wage monitoring and enforcement on projects that are subject to the fee. The reason and necessity for this subpart is for the sake of clarity so that the parameters of the SBX2-9 system will be set out fully by regulation and the public will not be required to look back through the legislation to find these restrictions and limitations.

The purpose of subpart (d) of this section is to authorize the Director to enter into agreements with other state agencies that award construction bond funds so that fees and project notices can be provided directly by those agencies to the Department. The reasons for entering into such agreements are that (1) they will provide for earlier and more reliable notification and payment of fees for bond-funded projects; (2) they will impose a negligible burden on other agencies, which will send an additional award notice and additional fee (deducted from the proceeds going to the awarding agency) but be relieved from later having to audit for the awarding agency's compliance with statutory fee requirements; (3) they will relieve awarding agencies of the administrative responsibility to calculate and forward fees on bond-funded projects; and (4) they will give the Department far fewer entities to communicate with on fee payments for bond-funded projects while making the Department less dependent on compliance with fee and notice requirements by a multitude of awarding agencies. The necessity for this subpart is to authorize an alternative for receiving notices and fees with respect to which the statute is silent.

New section 16453: The purpose of this section is to authorize awarding agencies that are subject to an existing LCP requirement the option of contracting with the Labor Commissioner (as Chief of DLSE) for fee-based monitoring and enforcement in order to meet that requirement. The purpose of subpart (b) is to set forth the fee that will be charged for such services, and provide that a lower fee may be negotiated for ongoing projects (per proposed section

[5] On a $5,000,000.00 project, the total fee would be $12,500.00.

16452(a)(4)). The purpose of subpart (c) is to require agreements in writing between the awarding agency and the Labor Commissioner, and to authorize the Labor Commissioner to decline to enter into an agreement if she believes the fee will be inadequate or that she lacks the staff or resources needed to perform the required work. The reason for this section is to provide a proposed alternative for awarding agencies that are subject to an LCP requirement but do not have an approved LCP and cannot find an approved third party LCP to perform or finish work on the project as the number of such programs diminishes. The reason for requiring contracts to be made with the Labor Commissioner is because she will have primary responsibility for monitoring and enforcement under Article 2 of this Subchapter (sections 16460 to 16464 below). The reason for authorizing her to decline agreements for specified reasons is in recognition that staffing and resource limitations on DLSE (like other state agencies) may preclude absorbing additional responsibilities on essentially a voluntary basis. As previously noted in this Initial Statement of Reasons, the authority to enter into such agreements is being proposed as an option, but no determination has been made yet on the Department's capacity to provide this option once the new SBX2-9 system goes into effect. The necessity for this section is to clarify that this option would be available as a form of "contracting out" for purposes of meeting ongoing LCP requirements in a number of statutes.

New section 16454: The purpose of this section is to address the specific situation of awarding agencies that choose to have fee-based monitoring and enforcement by the Department on all projects in order to enjoy higher exemptions from prevailing wage requirements. The reason for this section is to set forth the specific obligations of these awarding agencies, which include the obligation to conduct a prejob conference under Labor Code Section 1771.55(a)(3). Because Section 1771.55(a)(3) sets forth this prejob conference obligation in language that is identical to the prejob conference obligation imposed on LCPs by Labor Code Section 1771.5(b)(2), the regulatory language proposed for subpart (b) of this section is identical to the corresponding regulatory language in the LCP regulations (at section 16421(a)(2)), and it provides for use of the same Appendix A checklist that accompanies the LCP regulations. The necessity for this section is to clarify that this is a separate category of projects that are subject to fee-based monitoring and enforcement under SBX2-9, and to collect the requirements for awarding agencies that choose this option in a single regulation so that the public will not be required to search through the provisions of SBX2-9 and other regulations to ascertain what specific parts apply to this situation.

New section 16455: The purpose of this section is to provide rules governing the waiver of fees for awarding agencies with previously approved LCPs, that want to continue using those LCPs on their own projects in lieu of paying a fee to the Department for compliance monitoring and enforcement. The proposal has been drafted so that waiver will be provided only to awarding agencies that either use an approved LCP for all of their own projects (subpart (a)) or that use an approved LCP for all projects that otherwise would be subject to fee-based monitoring by DLSE under this subchapter (subpart (b)). The distinction between the two subparts is that awarding agencies that only use their LCPs for projects that otherwise would be subject to fee-based monitoring by DLSE, will still be required to provide the project notices required by new section 16452. This distinction in turn arises out of the Department's and public's need to know which entity (the awarding body's LCP or DLSE) has primary enforcement authority over a spe-

cific project in the event of any complaints about how monitoring is being conducted or that allege prevailing wage violations on that project. Waivers under either of these subparts will apply automatically and continuously unless forfeited through violation of SBX2-9's proscription against waiving fees for awarding agencies that contract their LCP responsibilities to a third party (as specified in subpart (c)). The purpose of subpart (d) is to specify that when the fee comes from funds provided by another source, *i.e.* state bonds, the awarding agency that is exempt from fees under this section may receive and retain the fee that otherwise might be paid to the Department.

The reason for not providing for waivers on a project by project basis is that it would require a substantial administrative structure and expense to receive and make determinations on individual requests. The overall necessity for this section is to provide regulatory criteria that will govern waivers in order to effectuate SBX2-9's directives authorizing the Director to provide for waivers.

Proposed Article 2.

New section 16460: The purpose of proposed subpart (a) of this section is to identify the unit that will carry out most of the specific compliance monitoring and enforcement responsibilities of the Department under SBX2-9. The purpose of proposed subpart (b) is to specify that the establishment of this new monitoring and enforcement unit does not have the effect of superseding other statutory responsibilities of awarding agencies with respect to prevailing wage violations, nor does it preclude the availability of other remedies to correct violations. The reason and necessity for this section is to provide introductory and clarifying information on what the Department will establish to carry out compliance monitoring and enforcement responsibilities and how the Department's responsibilities interrelate with other statutes concerning the enforcement responsibilities of awarding agencies and other means to redress prevailing wage violations.

New section 16461: The purpose of this section is to set forth specific activities that will be carried out by the new Compliance and Monitoring Unit ("CMU") to monitor and enforce compliance with prevailing wage requirements on projects subject to the fee. The purpose, reason, and necessity for subpart (a) are to provide explanatory language on the function of the CMU and the purpose of the regulation.

The specific purpose of subpart (b) is to specify the manner in which the CMU will discharge the Department's responsibility under Labor Code Section 1771.55(b)(2) to review payroll records on a monthly basis. This subpart tracks existing requirements for furnishing payroll records to LCPs under section 16432(b) of the LCP regulations, including monthly submission deadlines and specified formats for purposes of complying with other statutory and regulatory requirements governing certified payroll reporting. The purpose of the last sentence of this subpart is to authorize the CMU to provide for and require the electronic submission of certified payroll records, meaning that if the CMU establishes and makes available a web-based system that may be accessed and used by contractors without having to purchase special hardware or software or obtain specialized training, contractors may be required to submit reports through that system. The reason for this subpart is to clarify and specify the submission requirements for

certified payroll reports. The reason for a thirty day deadline is that it already applies to LCP-monitored projects and allows for records to be prepared, submitted, and reviewed within a reasonable time period after the work has been performed. The reason for electronic submission, which is already in prevalent use by awarding agencies and LCPs, is to eliminate the cost of paper forms and allow for immediate automated review (under subpart (c) of this section), functioning in a manner similar to the electronic filing of tax returns, and saving the Department substantial resources and time that otherwise would have to be devoted to the collection and manual review of payroll reports furnished continuously by thousands of contractors working on these projects throughout the state.

The specific purpose of subpart (c) is to specify the time period within which payroll records will be reviewed, consistent with Labor Code Section 1771.55(b)(1)'s mandate to review such records on a monthly basis, and to specify what the review process consists of. This subpart also tracks existing requirements for LCP review of payroll records under section 16432(b) of the LCP regulations. The reason for this subpart is to clarify and specify when and how the CMU will conduct the defined process of payroll record review, which as noted above, the Department hopes to do electronically.

The purpose of subpart (d) is to set forth the manner and extent to which the CMU will corroborate reported payroll information through independent sources, a process called "confirmation" under this subpart. This subpart as well tracks existing requirements for LCP confirmation of payroll records under section 16432(c) of the LCP regulations, but also differs in two respects. This subpart notes that the CMU may require the production of paystubs prepared in accordance with Labor Code Section 226 and may conduct random confirmation based on a recognized statistical sampling, providing more specific notice of particular ways in which confirmation may be conducted by the CMU. The reason for this subpart is to clarify and specify when and how the CMU will conduct the defined process of confirmation and provide specific notice of the intent to check for paystubs, since the failure to provide paystubs in accordance with Labor Code Section 226 often serves as an indicator of noncompliance with other labor standards.

The purpose of subpart (e) is to authorize and specify the CMU's intent to conduct on-site inspections of project sites, which may include visual inspection of notices that are required to be posted on the site, as well as inspections of records, observation of work activities, and worker interviews, among other things. This subpart also sets forth the CMU's statutory right of access to the job site and its authority to obtain information and make observations with respect to any laws enforced by the Labor Commissioner. Unlike the corresponding LCP regulation (section 16432(d)), this proposal would not require weekly site visits nor would it require visual inspection of posted notices on each visit. The reason for this subpart is to clarify and specify the CMU's authority to conduct site visits and what may transpire on those site visits. The reason for setting forth access rights and statutory authority is to curtail disputes over right of access and provide notice that, unlike LCPs, DLSE's monitoring and enforcement authority is not limited to prevailing wage violations, and that the CMU (as part of DLSE) may obtain information concerning other potential violations that come to its attention during a site visit. The reason this proposal does not quantify a required number of site visits or required activities to be conducted on each site visit, is that the CMU will not have the staffing nor will it have the ability to rely on

awarding agency site inspectors to make the weekly site visits that are required for LCPs under section 16432(d). In addition, in light of DLSE's expertise and clear understanding of its mission and role in enforcing labor standards, the CMU will not need the compulsion of a mandated frequency of visits or mandated activities in order to use this monitoring and enforcement tool in a prudent and effective manner.

The purpose of subpart (f) is to require preparation of an audit whenever the CMU determines that prevailing wage requirements have been violated. Under this subpart and the LCP regulation upon which it is based (section 16432(e)), "audit" has a defined meaning, referring to a written summary of wages and penalties due for each underpaid worker rather than the dictionary definition of audit. This subpart tracks the audit requirement in section 16432(e) but does not include the instructive detail, since it refers to an internal process that has already been in longstanding use by DLSE's public works investigators. The reason for this subpart is to clarify and specify when the CMU will perform audits, in accordance with Labor Code Section 1771.55(b)(1)'s directive to audit compliance if appropriate.

The necessity for this section and each of its subparts is to prescribe regulatory monitoring standards in accordance with Labor Code Section 1771.55(b)(2)'s mandate to adopt reasonable regulations setting forth the manner in which the Department will ensure compliance and enforce prevailing wage requirements on fee-based projects.

New section 16462: The purpose of this section is to require the CMU to accept and to respond to written complaints, subject to the discretion not to investigate complaints submitted more than 90 days after the completion of the project. The purpose of subpart (b) is to require the subject contractor and subcontractor to be notified as soon as practicable of a correctable violation, without requiring the CMU to disclose the complainant or a detailed summary of underpaid wages. The reason for this section is to provide notice to the public of DLSE's intent to investigate complaints alleging violations on projects being monitored by the CMU. While DLSE would not be precluded from following up on oral inquiries or complaints, the reason for requiring written complaints is to avoid disputes over what constitutes a complaint and the implication that DLSE must investigate whenever a communication of any kind suggests the possibility of a violation. The reason for requiring complaints to be submitted as soon as the violation is known is to aid in the early investigation and resolution of violations, while information is fresh and the extent of any underpayment is limited. The reason for providing discretion not to investigate complaints submitted more than 90 days after completion of the project is that the DLSE may have too little time left to investigate and make a formal determination before the expiration of its enforcement authority under Labor Code Section 1741.[6] The reason for requiring early notification to the subject contractor and subcontractor goes to heart of the purpose of CMU monitoring, which is to enable violations to be identified and corrected quickly before liabilities and the associated costs to workers, contractors, and DLSE escalate and require a substantial commitment of resources and the attendant delay associated with formal enforcement actions and

[6] The limitations period in Section 1741 is 180 days after acceptance or the filing of a notice of completion on the project, subject to an additional 180 days with respect to any contractor funds that have been retained by the awarding agency. The expiration of DLSE's authority does not preclude workers from pursuing wage claims against their employers within the lengthier limitations periods prescribed for such claims.

appeals. For the same reason, this proposal does not require CMU to first ascertain the full extent of any underpayment before providing this notification.

The necessity for this section is to provide clear notice to the public that the CMU will receive and respond to complaints and to establish specific regulatory directives on how complaints will be handled.

New section 16463: The purpose of this section is to provide a full set of definitional standards, notice requirements, and procedures for the withholding of contract payments to contractors or subcontractors who fail to submit timely or complete certified payroll records in accordance with the requirements of Labor Code Section 1776, regulatory section 16401, and the standards for furnishing payroll records specified in proposed section 16461(b). This proposed regulation provides the principal vehicle for enforcing the obligation of contractors to submit certified payroll records, which is to have contract payments withheld until the required reports are provided. It also sets forth limitations on the extent of withholding along with due process rights to notice and appeal with an expedited hearing for contractors who believe that the withholding is improper. This section tracks the provisions of section 16435 of the existing LCP regulations, as amended in 2008, placing the Labor Commissioner in the role of the LCP in terms of the authority to order withholdings and the obligations to provide specified notices and to discontinue withholding orders when the required reports are provided. The purpose of subpart (h) is to specify that the temporary withholding authority prescribed by this section does not limit or preclude the assessment of penalties for delinquent payroll records pursuant to the Labor Code Section 1776(g).

The reason and necessity for this proposed section is to provide a set of regulatory standards that enables DLSE to enforce statutory and regulatory obligations to furnish certified payroll records, while providing appropriate due process protections for contractors who believe that they are in compliance and that contract payments have been withheld improperly. The reason for specific withholding limitations and the right to an expedited hearing is to prevent undue harm to the contractor whose payments are being withheld and undue disruption to the project as a whole.

New section 16464: The purpose of this section is to specify and clarify that DLSE will use the enforcement procedures prescribed by Labor Code Section 1741 when it makes any formal determination that a contractor has violated prevailing wage requirements. The reason and necessity for this section is to provide notice to the public that the determination of a violation on a CMU-monitored project will be enforced under the same legal standards and procedures that govern any public works enforcement action by DLSE.

Technical Revisions to Succeeding Regulations on Severability and Debarment

Redesignation of Articles 6 and 8 of Subchapter 4 as Subchapters 4.6 and 4.8 within Chapter 8 of Title 8: The proposed adoption of a new subchapter 4.5, that will follow Article 5 of Subchapter 4 but precede these two articles, make this redesignation necessary. The reason and purpose for the redesignation of these articles as distinct subchapters is also to correct the

historical error of including these provisions within the broader heading of Labor Compliance Programs. The current Article 6, consisting of section 16500 on severability, was written to apply to all regulations within Subchapters 3 (Payment of Prevailing Wages on Public Works [commencing with section 16000]) and 4 (Awarding Body Labor Compliance Programs [commencing with section 16421]) rather than to only the latter. Thus, its meaning and application will be more clearly understood if designated as a separate subchapter rather than as an article and section within one of the two subchapters to which it applies.

The current Article 8, consisting of sections 16800 through 16803 on debarment, involves a process in which LCPs play no direct role other than notifying the Labor Commissioner of violations that might lead to debarment. Thus, its meaning and application also will be more clearly understood if designated as a separate subchapter rather than as an article and set of sections within a subchapter on Labor Compliance Programs to which it has no direct connection.

Proposed amendments to Section 16500: The reason, necessity, and purpose for changing word "Group" to "Subchapter" in two places in the first line of this section is to bring the regulatory text into conformity with the change in hierarchical headings used in the California Code of Regulations. When section 16500 was first adopted in 1992, Subchapters 3 and 4 were known respectively as Groups 3 and 4. The headings subsequently changed, but the regulatory text did not, resulting in potential confusion over what the term "Group" refers to. This proposed revision corrects that problem by bringing the text into conformity with the change in headings, consistent with the meaning and intent of the original regulation.